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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 448

JOSEPH P. KAMP,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN J. WILSON,
Attorney for Petitioner,
815 15th Street, N. W.,
Washington, D. C.

JO V. MORGAN, JR.,
Washington, D. C.,
Of Counsel.

November 7, 1949.

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Joseph P. Kamp prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia adjudging the petitioner guilty after conviction and imposing sentence under Rev. Stats. § 102, as amended by Act of June 22, 1938, c. 594, 52 Stat. 942, U.S.C. Title 2, § 192.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit may be found in the advance

sheets of 176 F. 2d at page 619 and at pages 13 and 14 of the printed Transcript of Record herein.[1]

Summary Statement of Matter Involved

Joseph P. Kamp, the petitioner herein, is and for many years has been an outspoken and vigorous opponent of Communism and communists both inside and outside of the Government. He was the Executive Vice-President and operating head of the Constitutional Educational League, Inc., when on October 2, 1944, he was served with a subpoena which, the Government claims, required him to appear before a Congressional Investigating Committee in Washington, D. C. on October 4, 1944, and to bring with him the records of the League showing the names and addresses of all persons who contributed One Hundred Dollars ($100.00) or more to the League in 1944. The subpoena is reproduced *in haec verba* in the indictment which is printed at page 3 of the printed Transcript of Record, and the subpoena is separately reproduced in the printed Transcript of Record at page 11.

Petitioner appeared before the Committee at the time and place designated, but refused to produce the records, stating in full his reasons for such refusal. At the trial the judge, upon the authority of *Fields* v. *United States,* 164 F. 2d 97, *cert. denied,* 332 U.S. 851, refused to permit the petitioner to state these reasons to the jury. Petitioner had been tried upon the same indictment before the *Fields* decision and had been permitted to testify fully as to his reasons for refusing to produce the subpoenaed records. The jury at that time was unable to agree and a mistrial resulted.

Petitioner demurred to the indictment upon several grounds, only one of which will be urged here, as it was in the Court of Appeals. Judge Morris of the District Court

[1] Hereafter sometimes indicated thus (R. 13-4).

overruled the demurrer, writing a memorandum opinion (R. 10).

At the trial, petitioner was precluded from offering any factual defense because of the too narrow definition of "willfulness" adopted by the trial judge. This error was repeated in the charge to the jury. In view of the opinion of the Court of Appeals in *Barsky* v. *United States,* 167 F. 2d 241, which decided this and another point adversely to the contentions of petitioner, the petitioner at pages 12 and 13 of his Brief saved his right to raise these points should certiorari be granted in the *Barsky* case, a petition in this Honorable Court, No. 766, October Term, 1947, not yet having been finally disposed of.

The final point which will be urged herein, which was likewise preserved in the Court below and which is the other point common to the *Barsky* case, is that the trial judge erred in permitting the Government to use against the petitioner statements which he had made before the Congressional Committee.

After the opinion in the Court of Appeals, the petitioner moved for rehearing and stay of the mandate until the *Barsky* petition was finally determined or some disposition made in this Honorable Court in *Eisler* v. *United States,* No. 255, October Term, 1948 (R. 16-7). On September 30, 1949, the Court of Appeals overruled the motion for rehearing and stayed the mandate until November 1, 1949 (R. 18).

Statement as to Jurisdiction

The judgment of the Court of Appeals was entered on December 13, 1948. The petition for rehearing was denied on September 30, 1949. By order dated October 28, 1949, Chief Justice Vinson extended the time for filing this petition for certiorari to and including November 7, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254.

Statutes Involved

1. 2 U.S.C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

> *Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. 28 U.S.C. § 634; R. S. § 859, as amended June 22, 1938, c. 594, 52 Stat. 943.

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

Questions Presented

1. Did the trial court err in holding that the indictment alleged an offense against the petitioner by ruling that the subpoena, reproduced in the indictment, commanded the petitioner rather than the Sergeant At Arms of the House of Representatives, or his special messenger, to appear before the Committee and produce the records?

2. Did the trial court err in holding that the term "willfully" in 2 U.S.C. § 192 did not require proof of specific intent when he excluded testimony of petitioner's intent and charged the jury, in effect, that evidence of specific intent was not required for conviction?

3. Did the trial court err in admitting evidence as to what petitioner testified before the Congressional Committee?

Reasons for Granting the Writ

The writ should be granted because the issues involved here have not heretofore been determined by this Honorable Court; and they are of great public importance. Perhaps most important, one of the issues here involved was raised in *Eisler* v. *United States,* No. 255, October Term 1948, this Honorable Court (see page 24 of the petition in that case with respect to our second question presented); and two of the questions here presented were raised on petition for writ of certiorari in *Barsky* v. *United States,* No. 766, October Term 1947 (see pages 12, 19, and 41 of the petition in that case with respect to our second and third questions presented). Certiorari has been granted in the *Eisler* case and while originally denied in the *Barsky* case, a petition for rehearing filed over a year ago has not yet been decided by this Honorable Court. It seems possible, therefore, that this Honorable Court may make important rulings upon at least two of the questions presented by this petition. Only by the allowance of this petition, in view of the denial in the Court of Appeals of petitioner's motion for rehearing and for stay of a mandate until some ruling by this Honorable Court in the *Eisler* and *Barsky* cases, are the rights of the petitioner to be protected.

Petitioner has been informed and believes that due to the large number of pending cases with respect to testimony before the so-called Un-American Activities Committee of

the House of Representatives, many other petitions requesting certiorari with respect to the same or analogous questions as those raised on this petition, have or will be filed in this Honorable Court. It seems even more likely, therefore, that in the foreseeable future this Court will render additional decisions in this field of law. Those decisions may have a bearing upon the rights of the petitioner herein. By the granting of this petition and the consideration of the questions hereby presented while considering the questions raised in similar cases, this petitioner may be given equal justice with the other petitioners.

That the trial court erred with respect to the three questions presented by this petition, and that these are questions of public importance upon which this Court should rule, is apparent from a detailed examination of the three points.

I

The Subpoena Did Not Call Upon Petitioner to Produce Records

The subpoena was addressed to the Sergeant At Arms of the House of Representatives, or his special messenger. The pronoun "you" appears twice in the paper (R. 7, 11, 12). Each time it is in connection with the command. If the pronoun refers to the Sergeant At Arms at one place, of necessity it refers to him at the other since the subpoena is not addressed to anyone else.

The Sergeant At Arms was thereby commanded to summon petitioner to appear before the Committee to testify; and the Sergeant At Arms was commanded to produce and bring the records, etc. Let it not be said that this is captious, or, as the Court of Appeals said in its opinion below, that the petitioner knew what it intended. That is what the paper says, and that is all it says.

In abbreviated form, the subpoena states:

> "To the Sergeant At Arms, * * *
> "You are hereby commanded to summon Joseph P. Kamp * * * to * * * appear before the Special Committee * * * to testify * * *; and at such time produce and bring with you the books * * *. Herein fail not, and make return of this summons. * * *"

To whom is addressed the concluding admonition? To the Sergeant At Arms, of course. Who shall "fail not?" Who shall "make return of this summons?" Obviously, this is the form of a warrant; not that of a subpoena. The Court of Appeals in its opinion stresses that the petitioner could have had no doubt that the Committee wanted the records, but if he and the records were being seized on warrant, his refusal to produce records would not be a violation of law. An analogous case could be imagined in ordinary criminal procedure wherein there is often a choice between summoning a witness to appear and testify and to produce documents, or to issue a warrant directing an officer to seize the documents. The document served upon the petitioner was of the latter type and if anyone was in contempt of Congress for failure to produce the documents, it was the Sergeant At Arms.

Even if we change the text of the subpoena so it would read

> "To the Sergeant At Arms:
> "You are hereby commanded to summon Joseph P. Kamp to appear as a witness and at such time to produce and bring *with him* the books, etc."

it would be the Sergeant At Arms not the subpoena who would summon petitioner to bring the records.

It is not conceded that the latter paraphrase is possible, but petitioner submits that even that interpretation does not result in the conclusion that the petitioner disobeyed

the subpoena because even under that construction it would not be the subpoena that required the petitioner to produce the documents.

The Government makes no claim in this case that default occurred in connection with an oral demand upon the petitioner, in the course of the Committee hearing or otherwise, to produce records. Moreover, a reading of the indictment cannot possibly lead to any conclusion other than that the subpoena in question was the sole commanding medium or vehicle. The last three paragraphs of the indictment demonstrate this beyond any peradventure. The final or charging paragraph puts the proposition in an inflexible vise, the language being that

> Petitioner did refuse to produce the papers, "*as in the said subpoena he was commanded,*" and "*thereby*" did make default. (R. 8).

The statute (2 U. S. C. § 192) provides that every person who, having been summoned as a witness to produce papers, willfully makes default, shall be deemed guilty of a misdemeanor. This is the crime which is denounced, and which must be alleged.

The indictment, in setting out the full text of the subpoena, shows on its face precisely how the Government claims that the petitioner was summoned. But, as we have seen, it was not the petitioner who was summoned. It follows, therefore, we submit, that the indictment does not charge petitioner with failure to produce records which he was summoned to produce; and thus, fails to charge him with an offense under the statute.

II

Definition of "Willful" Default

It is clear from the record in this case that the trial judge held that the word "willfully", in 2 U. S. C. § 192, did not

require evidence of specific intent, and that evidence of something more than an intentional and deliberate refusal was not required. This is apparent from rulings during the trial and from the trial judge's charge. For example, during the course of the trial, the following transpired:

"Mr. Wilson: I will preserve my point and answer Your Honor at the same time.

"I think that the offense of wilfull default has not been established. I maintain, in the first place, that 'wilfull' in this kind of case—which to me is different from the Fields case—means something more than an intentional, deliberate, conscious refusal, and I think that the more that it means has not been substantiated even *prima facie* by the Government in this case.

"The Court: Is that all?

"Mr. Wilson: I can't think of anything else at the moment.

"Mr. Hitz: While we are here it might be a good opportunity for me to suggest that I think the direct testimony of Mr. Kamp, should it be given, ought to be subject to objections of mine which will restrict it rather narrowly to the issues here, and I am saying it a little bit out of order, in point of time, for the reason I have had experience in this trial and the last one where it was very hard to stop your client once he launched into a speech, and it might be helpful to everybody concerned if we could straighten out the limits within which he will be permitted to testify, and perhaps the speech-making and the objections and the rulings can be cut down to a minimum if we know ahead of time the limits within which the Court will permit direct examination.

"Mr. Wilson: Let me ask the Court's indulgence. From the rulings which the Court has made so far I take it that if the defendant takes the stand you will not permit him to make any explanation of his default unless it is one which would come within your definition of a wilful default.

"Is there any degree of irregularity in my saying that I would not take the time of the Court and counsel

and the jury to put Mr. Kamp on the stand if that would be your ruling." (T. 171-2).[2]

* * * * *

"Mr. Wilson: May the Court and counsel understand that in view of what Your Honor has been kind enough to say in advance would be your ruling that we will not put the defendant on the stand, but that we do so because Your Honor has indicated that he would not be permitted to testify to any question of a good faith defense, except in the manner in which Your Honor has mentioned.

"The Court: I think perhaps you had better put it in another way, if you are going to put it on that form; that is, you ought to specify on the record the character of the defense that he would make and then let me rule.

"Mr. Wilson: All right. I would like again to split it into two bases.

"The Court: All right.

"Mr. Wilson: First, the character of his defense would be that he would attempt to show that this League was not a political committee and was not engaged in political activity, and that he did not believe that it was a political committee nor that it was engaged in political activity; and he would make explanations in that regard similar to this which he made to the Court out of the presence of the jury this morning. That is one point.

"Point two is that he would excuse his failure to deliver the records upon the other ground, elaborately set forth in Defendant's Exhibit for Identification No. 4, which assails the good faith of the Committee and explains his belief in the misuse of the information which he might give.

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[2] This symbol refers to the pages in the original transcript of testimony in the case which is in the unprinted entire record herein, being page numbered thusly in that entire record.

"The Court: The Court would sustain objection of the Government to any testimony along either of those lines.

"Mr. Hitz: I would so object if that were offered." (T. 173-4.)

Likewise, during his charge to the jury the trial judge stated:

"The Court charges you that the word 'wilfully' as used in that statute does not mean that he must have had any evil or malicious purpose or intent in what he did, but that if he did what he did deliberately and intentionally that satisfies the meaning of the word 'wilfully.' In other words, doing an act wilfully, in the sense in which it is used in this statute, simply means to do that act deliberately and intentionally." (T. 191-2.)

It is clear, therefore, that the trial court held that the word "wilfully" as used in 2 U. S. C. § 192, required only that the petitioner acted intentionally and deliberately as contrasted with accidentally and inadvertently, and did not require proof of specific intent. The above quotations from the record indicate that this ruling was prejudicial to petitioner. Exactly how prejudicial may be surmised from the fact that when petitioner had been tried upon the same indictment earlier and the evidence excluded had been admitted, the jury failed to reach a unanimous decision against him.

This statutory construction is in conflict with the decisions of this Honorable Court in *United States* v. *Murdock*, 290 U. S. 289, *Hartzell* v. *United States*, 322 U. S. 680, *Screws* v. *United States*, 325 U. S. 91, as well as with the legislative history of the statute. See 34 Cong. Globe 405-6, 34th Cong., 3d sess., remarks of Representative Orr.

This question is one of serious importance and of national significance. The ruling below seems clearly erroneous and should be rectified by this Court.

III

Admissibility of Statements Made Before the Congressional Committee

At the trial it was, of course, incumbent upon the Government to prove that the petitioner had custody of the records which the Government claimed the subpoena directed him to produce. The following excerpts from the transcript, omitting repetitious portions, indicate that the trial judge allowed statements made by the witness before the Congressional committee to be used against him as evidence tending to establish this essential part of the Government's case:

"By Mr. Hitz:

"Q. Mr. Lambert, I think we had gotten to the point where we were discussing the demands, if any, that were made upon Mr. Kamp by the Chairman of the Committee with reference to the subpoena.

"Will you tell us what demand it was that the Chairman made upon Mr. Kamp with reference to compliance with this subpoena?

"A. He demanded the records called for in the subpoena.

"Q. How did he describe the records as they were called for in the subpoena?

"A. By reading the part of the subpoena.

"Q. I think I have asked you before, but if I have it will probably do no harm again: Did Mr. Kamp respond in answer to that demand of the Chairman?

"A. He did.

"Mr. Wilson: Just answer that yes or no.

"By Mr. Hitz:

"Q. Did he deliver over to the Committee any document with reference to the demand made by the Chairman?

"A. He did not.

"Q. Mr. Lambert, did Mr. Kamp claim that there was a mistake of fact that prevented his turning over the requested information to the Committee?

"A. He did not.

"Q. Mr. Lambert, have you ever heard Mr. Kamp state whether or not he had the records called for by the subpoena? Answer merely, yes, I have heard him or I have not.

"A. Yes.

"Q. You have heard him state whether or not he had such records called for by the subpoena?

"A. Yes, sir.

"Q. Answer this by giving a number, if you are able to do so. How many times have you heard Mr. Kamp state whether or not he had such records?

"A. Twice.

"Q. When was the last time you heard Mr. Kamp so state?

"Mr. Wilson: Wait a minute. I object to that.

"The Court: On what ground?

"Mr. Wilson: upon the ground that this witness is not in position to testify to that fact.

"The Court: That is a very sketchy ground. Why do you say he isn't?

"Mr. Wilson: Certainly if the witness is going to refer to anything which occurred before the Committee he is in position to make that response.

"The Court: You are still making statements without explaining why. Why do you say he is not in such position?

"Mr. Wilson: In making my argument on this point I want to be sure that I am directing it to precisely the right point.

"Is Mr. Hitz attempting to elicit an answer from this witness with respect to something which he heard before the Committee? I would like to ask Mr. Hitz that question.

"Mr. Hitz: Not in answer to the immediate pending question.

"Mr. Wilson: I withdraw my objection for the moment.

"The Court: All right." (T. 150-2.)

* * * * *

"By Mr. Hitz:

"Q. What did Mr. Kamp say this morning from that chair with reference to whether or not he had such records as were called for by the subpoena?

"A. He said that he had them under his custody.

"Q. Don't answer this question until there has been an opportunity for objection if it is interposed.

"When is the first time that you heard Mr. Kamp make reference as to whether or not he had such records?

"A. It was before the Committee when demand was made upon him for those—or just before demand was made on him for those records, he admitted it.

"Mr. Hitz: That is all." (T. 155, 156.)

* * * * *

"Mr. Wilson: May I speak to Your Honor at the bench?

"The Court: All right.

(Thereupon, counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

"Mr. Wilson: I would like the record to show that at the moment I did not interpose any objection to the question propounded by Mr. Hitz of Mr. Lambert as to what Mr. Kamp said before the Committee, as to whether he had those records or not, because at the moment when that question was asked the fact had already gotten before the jury by previous question and answer.

"I move to strike the question and answer of Mr. Hitz and of the witness as to what response the defendant made before the Committee.

"The Court: What is the ground of the motion?

"Mr. Wilson: The ground for the motion is two-fold, sir.

"Mr. Hitz: Might I interrupt? I hate to interrupt but I do so to straighten out just what the question was.

"Mr. Wilson: All right.

"Mr. Hitz: The question was not what was said on that occasion; the question was when was that occasion, and Mr. Lambert then said it was before the Committee and he admitted—and I interrupted him to ask when was the first occasion and not what was said on the occasion.

"Mr. Wilson: Yes.

"The Court: I don't think there is much difference.

"Mr. Wilson: I don't either, because your previous question had been with respect to the admission as to whether he had the records. Therefore when Mr. Hitz said 'When was the occasion,' any answer giving the occasion would be in response to the question itself.

"Mr. Hitz: I am sorry I interrupted.

"Mr. Wilson: My contentions on the motion to strike and to the objection to this testimony were two-fold:

"In the first place, I say that the existence of these records is a part of the *corpus delicti* of this offense, and any admission of Mr. Kamp made in the Committee would be in the nature of a confession and is inadmissible until the Government has established by evidence *aliunde* the existence of those records.

"It has been established in this case, particularly by the admission of the defendant before the Committee, and therefore cannot be used for that purpose.

"There is a second ground of my objection. It is that under Section 193 of Title 2, which immediately precedes the section under which this prosecution is had, no witness is privileged to refuse to answer any question before the Committee on the ground of self-incrimination. The result is that this statute is either unconstitutional or it grants immunity.

"We all know that every inference should be indulged in favor of the constitutionality of the statute

because the statute read literally defeats the constitutionality of the Fifth Amendment. Therefore we must contend that it is constitutional upon the theory that it grants immunity. Therefore that answer which Mr. Kamp gave before the Committee would automatically grant him immunity against prosecution in respect of that answer, because now he is being prosecuted in respect to that answer in this case, because of the fact that existence of these records is a part of the *corpus delicti* of this offense." (T. 158-60.)

* * * * *

"The Court: But some objection could be made.

"Mr. Wilson: I made the objection.

"The Court: You are now making it; you didn't make it at the time.

"Mr. Wilson: I take it the Court will not pay any attention to the fact that I was late in making the objection.

"The Court: That is right; I am going to permit you to make your objection and get the benefit of it.

"It is time to go to lunch so I am not ready to rule on this." (T. 166.)

After the luncheon recess, the trial judge overruled the objection and granted defendant an exception (T. 168). To make the record clear the following was said:

"Mr. Wilson: Before taking up this I think the record has been made clear on this point, but I would like to be sure of it.

"Your Honor overruled my motion to strike the question and the answer of Mr. Lambert to which I addressed a motion to strike, but you overruled it, I understood, on its merits and not on its timeliness.

"The Court: Correct.

"Mr. Wilson: In other words, you treated it as if it had been made in time.

"The Court: Yes." (T. 169.)

It was reversible error for the trial court to admit any evidence as to the petitioner's testimony before the Com-

mittee. Section 634, Title 28 of the United States Code provides that no testimony given by a witness before a Congressional Committee shall be used against him in a subsequent criminal prosecution except in a prosecution for perjury committed in the giving of such testimony.

Section 634 is, on its face, available to petitioner. It does not require petitioner to assert a claim of privilege. *United States* v. *Monia,* 317 U. S. 424; *Jacobs* v. *United States,* 161 Fed. 694; *Alkon* v. *United States,* 163 Fed. 810; *8 Wigmore, Evidence* § 2283, p. 529 (3 ed., 1940). Upon a claim of privilege, petitioner could not have been compelled to testify (*Counselman* v. *Hitchcock,* 142 U. S. 547; *United States* v. *DeLorenzo,* 151 F. 2d. 122) so that Section 634 is applicable only to instances where the privilege is not asserted.

The ruling of the trial court has, in effect, read another exception into Section 634 for contempt.

That the admission into evidence of the testimony of the petitioner would assist the Government in this prosecution is no basis for depriving petitioner of the safeguards contained in Section 634. In *Cameron* v. *United States,* 231 U. S. 710, testimony of the bankrupt in one bankruptcy proceeding was offered to prove that the bankrupt had committed perjury in another subsequent bankruptcy proceeding. A statute similar to Section 634 was invoked by the accused with respect to the prior testimony. This Honorable Court held the testimony, which would have been of assistance to the perjury prosecution, to be inadmissible. And it has also been held that testimony under a statute such as Section 634 is inadmissible in a subsequent prosecution to test the credibility of the witness (*Jacobs* v. *United States,* 161 Fed. 694; *Alkon* v. *United States,* 163 Fed. 810); or to aid a subsequent prosecution against a witness for criminal contempt (*Wakefield* v. *Housel,* 288 Fed. 712; *In re Haley,* 41 F. 2d 379).

The exception in Section 634 for perjury provides no analogy for this contempt prosecution. That exception is necessary for otherwise the only possible evidence of a crime committed by the testimony would be unavailable. The crime of contempt—especially where, as here, the alleged contempt is the refusal to produce certain books and records and not the testimony given at the hearing—can be proven independently of the testimony. The admission of evidence of the testimony given before the House Committee into evidence went far beyond any exceptions to Section 634 which might obtain for testimony necessary to prove a crime committed by that testimony. Consequently, the perjury exception of Section 634 does not extend to this contempt prosecution. Indeed, the reading of an exception for the contempt here alleged into Section 634 tends to defeat the efficacy of Congressional investigating committees. Anything which discourages witnesses from testifying, which compels reliance upon claims of immunity, hampers the activities of such committees.

Lest it be said in reply to this petition that the error committed by the trial judge in admitting evidence of petitioner's testimony before the Congressional Committee was a harmless one, because evidence tending to prove the same facts had already been admitted, particularly by testimony as to admissions made by petitioner before the Court and out of the hearing of the jury (T. 152-5), it should be made clear that it is petitioner's contention here that that evidence also was erroneously admitted. Petitioner will so argue if this petition is granted. However, the question raised by the admission of that evidence alone is not, in this petitioner's opinion, one of sufficient national importance to urge upon this Honorable Court as an independent ground for the granting of this writ of certiorari.

However, the construction and application of immunity statutes, like 28 U.S.C. § 634, is a question of considerable

national importance. This Honorable Court may take judicial notice that such statutes exist with respect to testimony before administrative agencies, quasi-judicial and judicial tribunals. The statute here construed by the trial court is a particularly important one at the present time due to the great number of Congressional investigations, some of which, in particular, raise repeated questions in the field of civil liberties. It seems clear that the ruling of the trial court was erroneous and should be rectified by the action of this Honorable Court.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

JOSEPH P. KAMP,
Petitioner,
JOHN J. WILSON,
815 15th Street, N. W.,
Washington, D. C.,
Attorney for Petitioner.

JO V. MORGAN, JR.,
Washington, D. C.,
Of Counsel.

OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 448

JOSEPH P. KAMP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 13-14) is reported at 176 F. 2d 618.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1948 (R. 15), and a petition for rehearing (R. 16-17) was denied on September 30, 1949 (R. 18). On October 28, 1949, the time within which to file a petition for a writ of certiorari was extended by order of the Chief Justice to and includ-

ing November 7, 1949 (R. 21), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the summons issued by the House Committee to Investigate Campaign Expenditures commanded petitioner to appear and produce designated records before the Committee.

2. Whether the trial court erred in excluding evidence proffered by petitioner calculated to show that his default was made in good faith in the belief that the Committee was without jurisdiction to investigate the organization whose records he was required to produce and that it was not acting in good faith, and in instructing the jury that the term "willfully" as used in R. S. § 102 means "deliberately and intentionally."

3. Whether evidence showing that petitioner appeared before the Committee and admitted custody of the books and records called for in the subpoena was admitted in violation of R. S. § 859, which extends immunity to testimony given by witnesses before congressional committees.

STATUTES INVOLVED

Revised Statutes § 102, as amended, 2 U. S. C. 192, provides:

> Every person who having been summoned as a witness by the authority of either House of

> Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Revised Statutes § 859, as amended, 28 U. S. C. (1940 ed.) 634, provides:

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

STATEMENT

On October 2, 1944, the following summons, issued by authority of the House of Representatives, was served on petitioner, who was the executive vice-president and operating head of the Consti-

tutional Educational League, Inc. (R. 11-12; Tr. 6, 7, 12, 19-20, 23, 33, 88):[1]

> To the Sergeant at Arms, or his special messenger:
>
> You are hereby commanded to summon Joseph P. Kamp, 342 Madison Avenue, New York, New York, to be and appear before the Special Committee to Investigate Campaign Expenditures for the House of Representatives of the United States, authorized pursuant to House Resolution 551, Seventy-eighth Congress, for the election year 1944, of which the Honorable Clinton P. Anderson of New Mexico is chairman, in their chamber in the city of Washington, D. C. on the 4th day of October, 1944, at the hour of 10:00 o'clock a. m., then and there to testify touching matters of inquiry committed to said Committee; and not depart without leave of said Committee; and at such time produce and bring with you the books, papers, records and documents of the Constitutional Educational League, Inc., 342 Madison Avenue, New York, N. Y. showing the name and address of each person, partnership, committee, association, corporation, and any other organization or group of persons, who has made a contribution to or for such Constitutional Educational League, Inc., in one or more items of the aggregate amount or value, within the calendar year 1944, of $100 or more together with the amount and date of such contribution.

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[1] The designation "Tr." refers to the stenographic transcript of record on appeal.

Herein fail not, and make return of this summons.

Witness my hand and seal of the House of Representatives, at the city of Washington, this 28th day of September, 1944.

CLINTON P. ANDERSON,
(Chairman or Member.)

Attest: South Trimble.
[SEAL.]

Pursuant to this summons, petitioner appeared before the Committee but refused to produce the records specified therein (Tr. 11-12, 13, 34, 151, 156). On November 2, 1944, he was cited for contempt by the House (Tr. 7) and on December 20, 1944, he was indicted in the District Court for the District of Columbia for wilful default in refusing to produce the records called for in the summons, in violation of R. S. § 102 (R. 3-8).

Petitioner demurred to the indictment on the ground, *inter alia,* that the summons did not direct him, but the Sergeant at Arms or his special messenger, to produce the records in question (R. 9). The demurrer was overruled, the District Court holding in a memorandum opinion that petitioner understood from the summons, and conceded so in argument, that he, and not the Sergeant at Arms, was directed to produce the records. The court also noted that in refusing to produce the records before the Committee, petitioner made no complaint that the summons did not require him to do so. (R. 10.)

At the trial, the Government adduced evidence to show petitioner's default, including statements he made before the Committee, which were admitted over his objections (Tr. 150, 160, 166, 169). The court excluded evidence offered on behalf of petitioner tending to explain his reasons for his refusal to produce the records (Tr. 156, 170, 173-174).[2] In his charge to the jury, the trial judge instructed them as follows as to the meaning of the word "willfully" as used in R. S. § 102, *supra,* pp. 2-3 (Tr. 192):

> The Court charges you that the word "wilfully" as used in that statute does not mean that he must have had any evil or malicious purpose or intent in what he did, but that if he did what he did deliberately and intentionally that satisfies the meaning of the word "wilfully." In other words, doing an act wilfully, in the sense in which it is used in this statute, simply means to do that act deliberately and intentionally.

Petitioner was convicted (Tr. 195) and sentenced to four months' imprisonment and a fine of $100, payment of which was suspended (R. 11). His conviction was affirmed on appeal (R. 15).

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[2] His reasons were as follows: (1) there was no basis for investigating the League since, he claimed, it was not a political committee and was not engaged in political activity; and (2) he assailed the Committee's good faith and claimed that he believed it would misuse the requested information (Tr. 156, 170, 174).

ARGUMENT

The courts below were clearly right in rejecting petitioner's contention, renewed here (Pet. 6-8), that the command of the summons to appear before the Committee and produce the designated records was addressed, not to him, but to the Sergeant at Arms and, hence, that the document furnished no valid basis for this prosecution. True, it was addressed to the Sergeant at Arms in the salutation. But, obviously, it did not purport to command the Sergeant at Arms to appear and testify and produce the records. Rather, by its terms, it commanded him "to summon" petitioner to do so, and it closed with the admonition, "Herein fail not, and make return of this *summons.*" The plain import of the document was that, through the medium of the Sergeant at Arms, petitioner was summoned to appear with the records at the time and place designated. By the same token, it is equally clear that the pronoun "you" appearing in that portion of the document directing the production of the described records of the Constitutional Educational League referred, not to the Sergeant at Arms, but to petitioner. The command to "the Sergeant at Arms, or his special messenger" to summon petitioner was fulfilled upon service of the document and such service constituted a valid summons to him to appear and produce the records. As the Court of Appeals pointed out (R. 13), a summons to appear before a congressional

committee need not take any particular form; the contempt statute does not use the word "subpoena," but reads, "Every person who having been summoned," etc. And as we have pointed out above, the concluding words of the document characterized it as a "summons." Furthermore, petitioner was under no misapprehension as to what the document required of him, for he appeared before the Committee at the time and place designated therein. And although he refused to produce the records demanded, he made no objection to the form of the summons but rested his refusal on wholly unrelated grounds.

2. The petitioner complains (Pet. 8-11) of the action of the trial court in excluding evidence calculated to show that he acted in good faith and without any evil or malicious purpose in refusing to produce the records, and of the further action of the court, consistently with this ruling, in instructing the jury that the word "willfully" in R. S. § 102 means simply "deliberately and intentionally" (see p. 6, *supra*). Petitioner contends that the statute requires proof of "specific intent." The decisions of this Court which he cites as supporting his claim of error (Pet. 11) are inapposite and the contention has uniformly been rejected in cases arising under this statute. *Sinclair* v. *United States,* 279 U. S. 263, 299; *Townsend* v. *United States,* 95 F. 2d 352, 357 (C. A. D. C.), certiorari denied, 303 U. S. 664; *Fields* v. *United States,* 164 F. 2d 97, 100 (C.A.

D. C.), certiorari denied, 332 U. S. 851; *Barsky* v. *United States,* 167 F. 2d 241, 251 (C. A. D. C.), certiorari denied, 334 U. S. 843, petition for rehearing pending, No. 766, O. T. 1947; *Eisler* v. *United States,* 170 F. 2d 273, 280 (C. A. D. C.), certiorari granted, 335 U. S. 857, writ dismissed November 21, 1949, No. 255, O. T. 1948; *Dennis* v. *United States,* 171 F. 2d 986, 990-991 (C. A. D. C.), certiorari granted limited to another question, 337 U. S. 954, No. 14, this Term.

3. Finally, petitioner contends (Pet. 12-19) that R. S. § 859, *supra,* p. 3, barred testimony as to his statements before the Committee. A similar contention was raised in the *Barsky* case, *supra,* where a transcript of the proceedings before the congressional committee showing the defendants' default in refusing to produce subpoenaed records was admitted in evidence. The District Court in an exhaustive opinion overruled the objection that the statute forbade this (72 F. Supp. 165) and the Court of Appeals agreed (167 F. 2d at 252). The contention is also discussed in our brief in opposition in that case, pp. 15-18, to which the Court is respectfully referred.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General;
ALEXANDER M. CAMPBELL,
Assistant Attorney General;
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

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